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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| JEAN PAUL NATAF,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SERGE BENAT,<br><br>Defendant and Appellant. | B232756<br><br>(Los Angeles County<br>Super. Ct. No. SC093924) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Law Offices of Leslie Richards, PC and Leslie Richards, for Defendant and Appellant.

Jones & Associates and Mary K. Jones, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant, Serge Benat, appeals from the April 22, 2011 judgment entered in favor of plaintiff, Jean Paul Nataf. After a court trial, plaintiff received a 50 percent ownership interest in a parcel located on Putney Road (the Putney Road property). We affirm the final judgment.

## II. BACKGROUND

### A. The Pleadings

On May 16, 2007, plaintiff filed a complaint for contract breach, money had and received, and money lent arising from the parties' real estate joint venture. The complaint did not contain a cause of action for quiet title. However, the complaint requested judgment for "other and further relief" as the court deemed proper.

### B. The Evidence

On July 22, 2004, plaintiff and defendant entered into a written agreement to purchase property located on Ashcroft Avenue (the Ashcroft property) in West Hollywood. The parties agreed plaintiff would purchase the Ashcroft property. Later, plaintiff would sign a quitclaim deed to add defendant to the property title after escrow closed. The reason defendant would initially be listed as the buyer was because he had a better credit rating. The parties also agreed plaintiff would pay 60 percent of the down payment. Plaintiff would own 60 percent of the property. Defendant would pay 40 percent of the down payment and defendant would own 40 percent of the property.

On August 3, 2004, the parties entered into a second agreement entitled "Agreement to [P]urchase Real Estate" to purchase the Putney Road property. The

parties agreed defendant would initially purchase the property. Defendant would later sign a quitclaim deed to add plaintiff to the property title after escrow closed. The parties agreed they would be equal partners on the Putney Road property. In their brief three paragraph agreement, the parties agreed each would: contribute one-half of the down payment; pay one-half of the property improvement costs; and receive one-half of the profits made from selling the Putney Road property. Plaintiff testified he repeatedly requested his name be added to the Putney Road property deed. But defendant always found an excuse not to do so.

After defendant purchased the Putney Road property, the parties jointly conducted a walk-through of the parcel with Wesley Geiger, an unlicensed contractor. The parties agreed to spend $186,000 to renovate the Putney Road property but the costs increased because of mold problems. The parties initially agreed not to seek permits for the renovations. However, a building inspector driving by the Putney Road property noticed the roof replacement. As a result, the parties were required to secure permits for the renovations. Building inspectors required extensive rework of the shower, fence and walls which further increased the renovation costs. Mr. Geiger was paid $15 per hour to manage the renovation. None of the subcontractors who worked on the Putney Road property were licensed. Plaintiff paid Mr. Geiger and the subcontractors for work done on the Putney Road property.

Plaintiff oversaw the renovation by stopping by the Putney Road property when traveling to and from his home and office. At times, plaintiff also stopped by the Putney Road property during the day to purchase materials for the renovation. Plaintiff sent defendant a Quickbooks statement every month showing how much money was being spent on the renovation. But plaintiff testified he did not keep copies of the statements. The renovations on the Putney Road property ceased for a six-month period after plaintiff demanded but did not receive capital contributions from defendant. At one point, plaintiff had contributed $250,000 more than defendant into the Putney Road property. After the six-month period, defendant paid plaintiff $75,000 and renovations continued on the Putney Road property. Defendant was not involved in the Putney Road property

renovation until later. Defendant visited the property 5 times in 2004 and 10 times in 2005.

On October 31 and November 1, 2005, the parties signed two other agreements entitled, "**CONTRACT JOINT VENTURE**." The only difference between the two documents is that the parties' notarized signatures are on the November 1, 2005 agreement. Defendant testified he drafted the agreement. The October 31-November 1, 2005 agreement describes the two properties purchased by the parties and the cash contributions made by them. The parties agreed plaintiff would have sole ownership and responsibility for the mortgage and all expenses associated with the Ashcroft property. The agreement provides: "In these conditions on the sale of the Putney House [defendant] will have to get first his investment of $300,000.00 and will split the balance of the gross margin with [plaintiff] when the house of Putney is sold. . . . [¶] The Putney house has to be ready for sale no later than the 10th of January 2006. If an offer happens on Putney House and one of the parties don't agree on the sale price, the value of this offer will be the negotiation price between the partners and the partner refusing the offer will have to pay the shares of the other partner within 15 days of the proposal. [¶] If any proposal happens on Putney house within 6 months of the signature of this document, [defendant] will get back $150,000.00 on the split of the gross margin of Ashcroft House. And [plaintiff] will stay partner of 50% of the share of the Putney House."

In June 2006, defendant sent Mike Chimali, another contractor, to the Putney Road property. Defendant testified he was unsatisfied with the pace of the renovation. Plaintiff testified Mr. Chimali appeared with five or six other people. Plaintiff was told to leave the Putney Road property. Plaintiff stated this occurred one month before the estimated completion date for the Putney Road renovation. Mr. Chimali later billed defendant $65,000 for work on the Putney Road property.

At trial, plaintiff called two witnesses, Nili Hudson and Patrick Abbou, a realtor and an accountant respectively, to offer opinion testimony on the subject of damages. Ms. Hudson, a realtor since 1986, testified on the comparable sales in the Putney Road property area from 2006 to 2009. Ms. Hudson testified, assuming the renovations on the

Putney Road property had been completed in 2006, its value was: $950,000 at the end of 2006; $1 million in mid-year 2007; $1.1 million in the spring of 2008; and $800,000 in 2009.

Mr. Abbou reviewed plaintiff's allocations of expenses and income between his different real estate projects. Mr. Abbou received copies of checks from plaintiff for the Putney Road property renovation. But since there were missing checks, Mr. Abbou relied on the parties' October 31-November 1, 2005 joint venture agreement for his accounting assumptions. Mr. Abbou verified plaintiff spent $571,009 on the Putney Road property while defendant spent $450,000. Mr. Abbou made an assumption about defendant's monetary contributions. This was because Mr. Abbou had no documentation of it. On cross-examination, Mr. Abbou admitted some of the Quickbooks entries made by plaintiff could not be verified by canceled checks.

C. Statement of Decision

After the four-day bench trial, the trial court issued its statement of decision and judgment on April 22, 2011. The trial court found the parties entered into a joint venture agreement for the purpose of buying, renovating and selling real property. They were to divide any profit realized from the sale of the property. The trial court rejected defendant's argument that the joint venture agreement was unenforceable because plaintiff was an unlicensed contractor. The trial court found there was no evidence plaintiff held himself out or was employed as a contractor. As for damages, the trial court found Mr. Abbou's testimony concerning plaintiff's total capital contribution to the Putney Road property was unreliable. The trial court declined to use Mr. Abbou's calculations in fixing plaintiff's damages. The trial court explained: "Without a reliable opinion regarding the total capital contributed by [plaintiff] and [defendant], it is not possible to determine what profit, if any, would have been realized by the sale of the Putney house in 2006, 2007 or 2008. Similarly, it is not possible to determine whether and in what amount [plaintiff's] capital contribution exceeded that of [defendant]. [¶]

The court also finds that the joint venture agreement, which requires [defendant] to transfer to [plaintiff] a fifty [percent] ownership interest in the Putney [Road] property is enforceable. The 'CONTRACT JOINT VENTURE' (Exhibit 5, 6) does not, as [defendant] opined, relieve [defendant] of his duty to Quit Claim to [plaintiff] a fifty [percent] ownership interest in the Putney [Road] property." Judgment was entered in plaintiff's favor and he was awarded a 50 percent ownership interest in the Putney Road property. Defendant filed his notice of appeal on May 2, 2011.

## III. DISCUSSION

### A. Validity of Joint Venture Agreement

Defendant argues the trial court erred in enforcing the parties' joint venture agreement because plaintiff was an unlicensed contractor. Defendant reasons plaintiff had control over the operation and finances for the renovation of the Putney Road property. Defendant contends plaintiff acted as a contractor by overseeing the subcontractors including Mr. Geiger, obtaining construction materials and paying the workers. Defendant further argues the agreements entered into by the parties are illegal and void. Defendant argues the purpose of the agreements was to illegally renovate and sell real property with plaintiff performing illegal acts as an unlicensed contractor.

Defendant's arguments are meritless. The question of whether plaintiff acted as an unlicensed contractor is a question of fact. (*Vaughn v. De Kreek* (1969) 2 Cal.App.3d 671, 677; *Cargill v. Achziger* (1958) 165 Cal.App.2d 220, 222.) It is undisputed: plaintiff did not hold himself out as a contractor; defendant did not hire plaintiff to act as a contractor; defendant did not request plaintiff oversee the workers or purchase materials for the renovation; and plaintiff was never compensated by defendant for any services as a contractor. Substantial evidence supports the trial court's finding that plaintiff was not a contractor.

And there was substantial evidence to support the finding that plaintiff and defendant were members of a joint venture. Our Supreme Court has described a joint venture as "'an undertaking by two or more persons jointly to carry out a single business enterprise . . . .'" (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482; *Nelson v. Abraham* (1947) 29 Cal.2d 745, 749.) A joint venture exists if: the members have joint control over the enterprise, even though they may delegate it; the members share the profits of the undertaking; and the members each have an ownership interest in the enterprise. (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370; *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, 91; *Orosco v. Sun-Diamond Corp.* (1997) 51 Cal.App.4th 1659, 1666.) Whether a joint venture actually exists depends on the parties' intention. (*Unruh-Haxton v. Regents of University of California, supra,* 162 Cal.App.4th at p. 370; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 819.) The existence of a joint venture is a question of fact subject to substantial evidence review. (*Bunn v. Lucas, Pino, and Lucas* (1959) 172 Cal.App.2d 450, 462, disapproved on a different point in *Chambers v. Kay* (2002) 29 Cal.4th 142, 155, fn. 8.) Here, substantial evidence supports the existence of a joint venture between the parties. The parties entered into three agreements that described their ownership interests in the Ashcroft and Putney Road properties. Under the three agreements, the parties agreed to make monetary contributions to the purchase and renovation of those properties and to share profits from their sale. The parties' intent to form a joint venture is also established by the October 31-November 1, 2005 agreement entitled, "Contract Joint Venture." Further, the parties had joint control over the Putney Road property by jointly hiring Mr. Geiger. Finally, they instructed Mr. Geiger not to obtain permits for the renovation.

B. Novation

Civil Code section 1530 defines novation as the substitution of a new obligation for an existing one. A novation is a new agreement that supplants the original contract

and extinguishes the original obligation. (Civ. Code, § 1531, subd. (1); *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431.) The parties must clearly intend to extinguish rather than merely modify the original agreement. (*Vallely Investments, L.P v. Bancamerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 832 ["A novation requires an express release by the party entitled to enforce a promise."]; *Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 977.) The party asserting the existence of a novation has the burden of proof. (*Howard v. County of Amador, supra*, 220 Cal.App.3d at p. 977; *Davies Machinery Co. v. Pine Mountain Club, Inc.* (1974) 39 Cal.App.3d 18, 24-25.) We review issues concerning a novation for substantial evidence. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 865; *Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 458-459.)

Defendant argues the October 31-November 1, 2005 joint venture agreement was intended to supplant the prior agreements between the parties. But the October 31-November 1, 2005 agreement does not so state. The October 31–November 1, 2005 agreement describes the Ashcroft and Putney Road properties and the cash contributions made by the parties to the joint venture as of October 31, 2005. The parties agreed plaintiff would have sole ownership and responsibility for the mortgage and all expenses associated with the Ashcroft property. The parties also agreed to split the profit on the Putney Road property sale if an offer was made on the property within six months of the date of the agreement. The October 31-November 1, 2005 agreement makes no reference to the parties' July 22 and August 3, 2004 contracts. Nothing in the October 31-November 1, 2005 joint venture agreement releases defendant from the obligation to execute a quitclaim deed adding plaintiff to the Putney Road property deed. Defendant has failed to meet his burden of proving the October 31–November 1, 2005 agreement was a novation. And there is substantial evidence there was no novation.

## C. Remedy

Defendant argues the trial court abused its discretion when it granted plaintiff a 50 percent ownership of the Putney Road property. Defendant argues the complaint did not state a quiet title cause of action. Nor, defendant argues, does the complaint's prayer for relief seek to quiet title. However, the complaint's prayer for relief seeks "such other and further relief as the Court may deem" proper. Thus, the trial court did not abuse its discretion in concluding the complaint seeks equitable remedies in addition to damages. Trial courts have broad equitable power to fashion appropriate remedies. (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1552 ["In actions founded on contract, courts have available for use in appropriate cases, in addition to specific performance, equitable remedies based on reformation, excuse of conditions and rescission . . . ."]; *Zarrahy v. Zarrahy* (1988) 205 Cal.App.3d 1, 4.) Here, the trial court did not abuse its discretion in enforcing the parties' August 3, 2004 agreement by granting plaintiff a 50 percent ownership of the Putney Road property.

## IV. DISPOSITION

The judgment is affirmed. Plaintiff, Jean Paul Nataf, shall recover his costs on appeal from defendant, Serge Benat.

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TURNER, P. J.

We concur:

ARMSTRONG, J. MOSK, J.